15-3775

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR. AS CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Plaintiffs-Appellants

-against-

ALTITUDE EXPRESS dba SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees

En Banc Rehearing of the Panel Opinion Reported at 855 F. 3d. 76 (2d. Cir. 2017)

APPELLEES' APPENDIX

ZABELL & ASSOCIATES, P.C.
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Filed: July 28, 2017

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EEOC FORM 161 (11/09)

U.S. Equal Employment Opportunity Commission

Director of Human Resources
ALTITUDE EXPRESS INC. D/B/A/ SKYDIVE LONG ISLAND
525 Jan Way
Calverton, NY 11933

PERSON FILING CHARGE

Donald Zarda

THIS PERSON *(check one or both)*

[X] Claims To Be Aggrieved

[ ] Is Filing on Behalf of Other(s)

EEOC CHARGE NO.

520-2010-02921

NOTICE OF CHARGE OF DISCRIMINATION

(See the enclosed for additional information)

This is notice that a charge of employment discrimination has been filed against your organization under:

[X] Title VII of the Civil Rights Act (Title VII) [ ] The Equal Pay Act (EPA) [ ] The Americans with Disabilities Act (ADA)

[ ] The Age Discrimination in Employment Act (ADEA) [ ] The Genetic Information Nondiscrimination Act (GINA)

The boxes checked below apply to our handling of this charge:

1. [ ] No action is required by you at this time.
2. [ ] Please call the EEOC Representative listed below concerning the further handling of this charge.
3. [X] Please provide by **08-SEP-10** a statement of your position on the issues covered by this charge, with copies of any supporting documentation to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
4. [ ] Please respond fully by _____ to the enclosed request for information and send your response to the EEOC Representative listed below. Your response will be placed in the file and considered as we investigate the charge. A prompt response to this request will make it easier to conclude our investigation.
5. [X] EEOC has a Mediation program that gives parties an opportunity to resolve the issues of a charge without extensive investigation or expenditure of resources. If you would like to participate, please say so on the enclosed form and respond by **23-AUG-10** to **Elizabeth Cadle, ADR Coordinator, at (212) 336-3646**. If you DO NOT wish to try Mediation, you must respond to any request(s) made above by the date(s) specified there.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Elizabeth Cadle,
Enforcement Manager

EEOC Representative

Telephone **(212) 336-3646**

New York District Office
33 Whitehall Street
5th Floor
New York, NY 10004

Enclosure(s): [X] Copy of Charge

CIRCUMSTANCES OF ALLEGED DISCRIMINATION

[ ] Race [ ] Color [X] Sex [ ] Religion [ ] National Origin [ ] Age [ ] Disability [ ] Retaliation [ ] Genetic Information [ ] Other

See enclosed copy of charge of discrimination. Please provide two (2) copies of your response to the investigator mentioned above. Thank you.

Date	Name / Title of Authorized Official	Signature
August 6, 2010	**Spencer H. Lewis, Jr., Director**	

JUL 14 2010

EEOC-NYDO-CRTU

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing this form.

☒ FEPA
☒ EEOC

CHARGE NUMBER: 520-2010-02921

NY SDHR
(State or Local Agency, If Any) and EEOC

NAME (Indicate Mr., Ms., or Mrs.)	HOME TELEPHONE NUMBER (Include Area Code)
Donald J. Zarda	901-569-5867

STREET ADDRESS	CITY, STATE AND ZIP CODE	DATE OF BIRTH
PO Box 312	Richmond, MO 64085-0312	05-27-1970

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (*If more than one list below*).

NAME	NO. OF EMPLOYEES/MEMBERS	TELEPHONE NUMBER (Include Area Code)
Altitude Express, Inc. dba SkydiveLongIsland	15+	631-208-3900

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
525 Jan Way	Calverton, NY 11933	Suffolk

NAME	NO. OF EMPLOYEES/MEMBERS	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY, STATE AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON (*Check appropriate box(es)*)

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER (*Specify*)

DATE DISCRIMINATION TOOK PLACE
EARLIEST LATEST
6/28/10
☐ CONTINUING ACTION

THE PARTICULARS ARE (*If additional space is needed, attach extra sheet(s)*)

See Attached

GREGORY S. ANTOLLINO
Notary Public, State of New York
No. 02AN6064756
Qualified in New York County
Commission Expires 8/26/ 10

GREGORY S. ANTOLLINO
Notary Public, State of New York
No. 02AN6064756
Qualified in New York County
Commission Expires 8/26/ 10

I want this charge filed with the EEOC and the State FEPA. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

X Donald J. Zarda
Date 07-12-2010 Charging Party (Signature)

NOTARY – (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

X Donald J. Zarda

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE:
(Month, day and year) 07-12-2010

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

DONALD J. ZARDA, being duly sworn, does hereby depose and say as follows in support of my charge of gender discrimination:

1. I was employed at Altitude Express, Inc., dba Skydive Long Island (hereinafter "Altitude") as a Tandem & Accelerated Freefall Instructor in the summers of 2001, 2009 and 2010. Altitude Express has approximately 20-30 employees. I've been a licensed instructor in this field since 1995.

2. I am a male and also a gay man. I am not making this charge on the grounds that I was discriminated on the grounds of my sexual orientation. Rather, I am making this charge because, in addition to being discriminated against because of my sexual orientation, I was also discriminated against because of my gender. My claim is because I did not conform my appearance and behavior to sex stereotypes, I suffered adverse employment action, and was discriminated against, at least in part because of my sex.

3. Specifically, it was known at work that I am gay and I was open about it. My boss, however, the owner of Altitude, Ray Maynard, was hostile to any expression of my sexual orientation that did not conform to sex stereotypes, to wit: First, he criticized my wearing of the color pink at work. Women at the workplace were allowed to wear pink, and did without criticism. However, I was not given the same right.

4. On one occasion, I broke my ankle and had to wear a cast. It so happened that the color of the cast I chose was pink. When Ray saw the pink cast for

Def. Exh. I

SA003

the first time he scoffed at it and said, "That looks gay." Later, at a staff meeting he said, "If you're going to remain here for the day, you're going to have to paint that black," pointing to my cast

5. I left for the day then came back on another occasion. I had not painted the cast black as requested, however, because my foot was exposed, he was able to see my toenails were as well, which were painted pink. At the time, that was my preference. Women often wore open toe sandals at work, and I am certain I saw women wearing pink toenail polish. Additionally, many other instructors were barefoot at the drop zone. When Ray saw my pink toenail polish, however, he insisted that I wear a sock and cover up my foot.

6. Ray openly tolerated men discussing women and their physical attributes. Specifically, Ray and the men at the office would ogle at women's breasts, including on videos that the company had procured for passengers who had hired the company for a joy ride skydive with an accompanying video.[1] Men often talked of their sexual exploits, and Ray openly discussed his marriage. My mentioning the fact that I was gay to a passenger, however, got me fired, as I will explain.

7. A skydive is an intimate experience. The instructor must strap himself hip to hip and shoulder to shoulder with the client. Before the client and the instructor jump out of the plane, the client is often sitting on the instructor's lap. The experience is tense for a novice, who is about to jump out of the plane with a stranger strapped to him or her. In order to break the ice, instructors often make light of the intimate situation by making a joke about it.

[1] Customers who hired Altitude were referred to as "passengers."

Def. Exh. I

5

SA004

8. For example, when a man is strapped to another man, an instructor might say something like, "I bet you didn't know you were going to be strapped so close to a man." "This is awkward for me, too." "That's the straps you're feeling" (referring to a bulge).

9. On more than one occasion, I heard a straight man even say, jokingly, "Don't worry, I'm a lesbian," when strapped with men; or, when a straight man was strapped to a straight man (especially when his girlfriend was present), "Does you're girlfriend know that you're gay?"

10. My way of breaking the ice, on occasion over the years, when I was strapped with a woman was to say, "Don't worry, I'm gay." On June 18, 2010, I was suspended for making this remark to a woman (I believe her name was Rosanna). Ray intimated that either she or her boyfriend (or both of them) were offended because of it.

11. In my termination interview, Ray said that I was fired because I had discussed my "personal escapades" outside of the office with a passenger (Rosanna). This was completely untrue. All of the men at Altitude made light of the intimate nature of being strapped to a member of the opposite sex. I was fired, however, because the levity I used honestly referred to my sexual orientation and did not conform to the straight male macho stereotype.

Def. Exh. I

6

SA005

SA005

12. Ray also made other statements in defense of his termination of me, including, most incredibly, that I had touched Rosanna inappropriately. These reasons, however, were a false pretext for my termination which happened because of my failure to conform to stereotypical gender roles for men.

Dated: New York, New York
July 12, 2010

DONALD ZARDA

SWORN TO BEFORE ME ON July 12, 2010

NOTARY PUBLIC

GREGORY S. ANTOLLINO
Notary Public, State of New York
No. 02AN5054755
Qualified in New York County
Commission Expires 8/26/ 10

4

Def. Exh. I

7

SA006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,	:	
Plaintiff,	:	ORDER
	:	10-CV-4334 (JFB)(ARL)
– against –	:	
ALTITUDE EXPRESS, INC., et al.	:	
Defendants.	:	

JOSEPH F. BIANCO, District Judge:

For the reasons set forth on the record during the telephone conference on March 28, 2014, IT IS HEREBY ORDERED that:

(1) Defendants' motion for summary judgment (*see* Docket No. 109) is granted in part and denied in part. Specifically, the motion is denied with respect to the sexual orientation discrimination claim based on his termination under New York State law, and the minimum wage claim under New York State law. The motion is granted as to the gender stereotype discrimination, hostile work environment, and overtime claims.

(2) Plaintiff's motion for partial summary judgment (Docket No. 132) is denied in its entirety.

(3) Defendants' motion to strike a portion of plaintiff's reply memorandum (Docket No. 139) is denied.

(4) Plaintiff shall submit his Second Amended Complaint, including the amount-in-controversy allegation, by March 31, 2014. Defendants' motion to dismiss, if any, shall be filed by April 15, 2014. Plaintiff's opposition shall be due by April 25. Defendants' reply shall be due by May 2.

(5) The parties shall submit a joint pretrial order by June 2, 2014.

SO ORDERED.

JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

Dated: March 28, 2014
Central Islip, NY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DONALD ZARDA,

Plaintiff,

-against-

ALTITUDE EXPRESS, INC., dba Skydive Long Island, and RAY MAYNARD,

Defendants.
----------X

COMPLAINT

CV 10 4334

JURY TRIAL DEMANDED

BIANCO, J.

LINDSAY, M.J.

Plaintiff hereby alleges upon personal knowledge and information and belief as follows:

NATURE OF THIS ACTION

1. This action is brought by Plaintiff, a gay man, to recover damages for Defendants' discriminatory and otherwise illegal conduct in, among other things, discharging him because of a homophobic customer.

THE PARTIES

2. Plaintiff is a citizen of the State of Missouri.

3. Defendants Altitude Express, Inc., operating as "Skydive Long Island" in Calverton, New York is a corporation organized under the laws of the State of New York, located in Suffolk County, and operates as a "drop zone," i.e., a place

where individuals can come to Skydive under the close supervision of experienced Skydive instructors.

4. Defendants Ray Maynard is the Chief Executive Officer of Skydive Long Island and, upon information and belief, its sole shareholder. Upon information and belief he is a citizen of New York.

5. Plaintiff is an experienced Tandem and Freefall (i.e., Skydive) instructor, who was an employee at Skydive Long Island for various summers in the last decade until his termination in July 2010.

JURISDICTION AND VENUE

6. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States, among them Title VII of the Civil Rights Act of 1964 as amended and the Fair Labor Standards Act. Jurisdiction is also independently predicated on diversity of citizenship.

7. Venue is properly placed in this district pursuant to 28 U.S.C. § 1391(c) in that Defendants Skydive Long Island is deemed to reside in this judicial district.

FACTUAL ALLEGATIONS UNDERLYING PLAINTIFF'S CLAIMS

8. Plaintiff repeats and realleges the allegations set forth in all previous paragraphs as if fully set forth herein.

9. Plaintiff was employed at Altitude Express, Inc., dba Skydive Long Island (hereinafter "Altitude") as a Tandem & Accelerated Freefall Instructor in the summers of 2001, 2009 and 2010. Altitude Express has approximately 20-30 employees.

10. Plaintiff is has been a licensed instructor in this field since 1995. He has participated in 3500 jumps over the course of his distinguished career.

11. He worked for the defendants in the summers of 2001, 2009 and 2010. Skydiving is a seasonal sport and defendants operate only in the warmer weather.

12. While employed by Skydive Long Island, plaintiff was expected to be at work, seven days a week, until released. The hours of operation were either 7:30 AM to sunset or 9:30 AM to sunset and thus plaintiff was expected not to leave the premises in case a potential customer came, unless it was raining.

13. Although expected to be on the premises approximately twelve (or more) hours per day, plaintiff was only paid per jump. Some days went by when he would be there all day and not make a dime, not even minimum wage for the hours he spent at work at his employer's insistence.

14. A skydive is an intimate experience. The instructor must strap himself hip to hip and shoulder to shoulder with the client. Because of this, before they dive, students must sign a release that contains the following language:

> If I am making a student jump, I understand that I will be wearing a harness which will need to be adjusted by the jumpmaster. If my jump is a tandem jump, I understand that the tandem master will attach my harness to his and that this will put my body in close proximity to that of the tandem master. I specifically agree to this physical contact between the tandem master and myself.

15. Before the client and the instructor jump out of the plane, the client is often sitting on the instructor's lap. The experience is tense for a novice, who is about to jump out of the plane with a stranger strapped to him or her.

16. Notwithstanding the waiver, in order to break the ice and make the client more comfortable, instructors often make light of the intimate situation by making a joke about it.

17. For example, when a man is strapped to another man, an instructor might say something like – and plaintiff heard at defendants location on a number of occasions - "I bet you didn't know you were going to be strapped so close to a man." Plaintiff also heard, "That's the straps you're feeling" (referring to a bulge).

18. On more than one occasion, plaintiff heard straight instructors say, jokingly, when strapped to male clients, "Don't worry, I'm a lesbian." Or, when a straight man was strapped to a straight man (especially when his girlfriend was present), the instructor might say, "Does you're girlfriend know that you're gay?"

19. This was an openly tolerated form of banter. Plaintiff had no problem with it and his way of breaking the ice, on occasion over the years, when I was strapped with a woman was to say, "Don't worry, I'm gay."

20. This was never a problem until one homophobic customer complained about it. On June 18, 2010, plaintiff was suspended for making this remark to a woman whose name, upon information and belief, was Rosanna.

21. It was known at work that plaintiff is gay and he was open about it. Notwithstanding this, however, the terms and conditions of employment were not the same as compared between plaintiff and other similarly situated employees.

22. Ray Maynard was hostile to any expression of sexual orientation that did not conform to sex stereotypes. As one example, he criticized

plaintiff's wearing of the color pink at work. Women at the workplace were allowed to wear pink, and did without criticism.

23. However, on one occasion, plaintiff broke his ankle and had to wear a cast. It so happened that the color of the cast plaintiff chose was pink. When Ray saw the pink cast for the first time he scoffed at it and said, "That looks gay." Later, at a staff meeting he said, "If you're going to remain here for the day, you're going to have to paint that black," pointing to my cast.

24. Plaintiff left for that day then came back on another occasion. I had not painted the cast black as requested, however, because my foot was exposed, he was able to see plaintiff's toenails were as well, which were painted pink. At the time, that was plaintiff's preference. Women often wore open-toed sandals to work, as well as pink toenail polish.

25. Additionally, many other instructors were barefoot at the drop zone. When Ray saw my pink toenail polish, however, he insisted that I wear a sock and cover up my foot.

26. Plaintiff would have tolerated these backwards attitudes towards men and their use of certain colors, had plaintiff not been fired for expressing to a customer that he was gay.

27. Ray openly tolerated men discussing women and their physical attributes. Specifically, Ray and the men at the office would ogle at women's breasts, including on videos that the company had procured for passengers who had hired the company for a joy ride skydive with an accompanying video.[1] Men often talked of their sexual exploits, and Ray openly discussed his marriage.

28. Plaintiff mentioning the fact that he is gay to a passenger, however, got him fired.

29. In his termination interview, Ray said that plaintiff was being fired because plaintiff had discussed my "personal escapades" outside of the office with a passenger (Rosanna).

30. This was completely untrue. All of the men at Altitude made light of the intimate nature of being strapped to a member of the opposite sex. Plaintiff was fired, however, because the levity he used honestly referred to my sexual orientation and did not conform to the straight male macho stereotype. Mentioning one's sexual orientation is not a discussion of a "personal escapade."

31. Ray also made other statements in defense of his termination of plaintiff, including that Rosanna had touched Rosanna inappropriately.

---

[1] Customers who hired Altitude were referred to as "passengers."

Rosanna thus complained simultaneously that plaintiff was gay and that he had gratified himself sexually by touching her in a heterosexual manner.

32. These reasons, however, were a false pretext for plaintiff termination which happened because of one homophobic customer's complaint about being near a gay person and of because of plaintiff's failure to conform to stereotypical gender roles for men.

FIRST CAUSE OF ACTION
DISCRIMINATION UNDER TITLE VII

33. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

34. Plaintiff was fired because his behavior did not conform to sex stereotypes.

35. Such actions were in violation of Title VII.

36. By virtue of the foregoing, Plaintiff has been damaged.

SECOND CAUSE OF ACTION
SEXUAL ORIENTATION DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

37. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

38. Plaintiff was fired because of his sexual orientation.

39. Such actions were in violation of the Executive Law of the State of New York.

40. By virtue of the foregoing, Plaintiff has been damaged.

THIRD CAUSE OF ACTION
VIOLATION OF THE FLSA

41. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

42. At all times mentioned herein, as limited by the applicable statutes of limitation, Defendants failed to comply with the FLSA, in that Defendants frequently required and permitted Plaintiff to work more than 40 hours per week, but provision was not made by Defendants to pay Plaintiff at the rate of one and one-half times the regular rate for the hours worked in excess of the hours provided for in the FLSA.

43. Additionally, plaintiff was not even paid minimum wage for the time he was required to sit and wait around for potential skydive clients to appear

44. Most of the records concerning the number of excess hours worked by Plaintiff, and the compensation they received in work weeks in which excess hours were worked, are in the exclusive possession and under the sole custody and control of the Defendants.

45. Plaintiff is unable to state at this time the exact amount owing to them at this time, and proposes to obtain such information by appropriate

discovery proceedings to be taken promptly in this cause.

46. Upon information and belief, Defendants is and was at all relevant times herein aware that overtime pay is mandatory for non-exempt employees who work more than 40 hours per week.

47. Upon information and belief, Defendants are and were at all material times herein fully aware that Plaintiff worked more than 40 hours per week without receiving overtime compensation for such additional work.

48. Additionally, plaintiff did not even earn minimum wage for the majority of hours he spent at the defendant company.

49. Based upon the foregoing, Defendants, for violating the FLSA, are liable on Plaintiff's first cause of action in an amount to be determined at trial, plus liquidated damages, attorney's fees and costs.

FOURTH CAUSE OF ACTION
VIOLATION OF THE NEW YORK STATE OVERTIME LAW

50. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

51. At all material times herein Defendants failed to comply with, *inter alia*, NYLL § 663(1) and 12 NYCRR § 142-2.2 in that Plaintiff consistently worked for Defendants in excess of the maximum hours provided by state and federal law, but provision was not made by Defendants to pay Plaintiff at the rate of one and one-half times the regular rate for the hours worked in

excess of the hours provided for by state and federal law.

52. Upon information and belief, Defendants were at all material times herein aware that overtime pay is mandatory for non-exempt employees who work more than 40 hours per week.

53. Upon information and belief, Defendants' non-payment of overtime pay to Plaintiff was willful.

54. Based upon the foregoing, Defendants, for consistently violating New York's Labor Law and its implementing regulations are liable on Plaintiff's second cause of action in an amount to be determined at trial, plus a 25% statutory penalty, attorney's fees and costs.

WHEREFORE, Plaintiff demands as follows:

A. Compensatory damages in excess of the jurisdictional limit of this court;

B. Punitive damages;

C. Cost of suit and attorneys fees;

D. Liquidated damages;

E. Such other relief as the Court may deem just and proper.

Dated: New York, New York
September 20, 2010

GREGORY ANTOLLINO
Attorney for Plaintiff
1123 Broadway Suite 1015
New York, NY 10010
(212) 334-7397

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DONALD ZARDA,

Plaintiff,

-against-

ALTITUDE EXPRESS, INC., dba Skydive Long Island, and RAY MAYNARD,

Defendants.

----------X

SECOND AMENDED COMPLAINT

10-cv-04334-JFB

JURY TRIAL DEMANDED

Plaintiff hereby alleges upon personal knowledge and information and belief as follows:

NATURE OF THIS ACTION

1. This action is brought by Plaintiff, a gay man, to recover damages for Defendants' discriminatory and otherwise illegal conduct in, among other things, discharging him because of a homophobic customer.

THE PARTIES

2. Plaintiff at the time of the filing of this complaint was a citizen of the State of Missouri and is currently a citizen of the State of Texas. The amount in controversy concerning the dispute - including merely those claims that survived summary judgment - exceeds $75,000.

3. Defendants Altitude Express, Inc., operating as "Skydive Long Island" in Calverton, New York is a corporation organized under the laws of the State of New York, located in Suffolk County, and operates as a "drop zone," i.e., a place where individuals can come to Skydive under the close supervision of experienced Skydive instructors.

4. Defendant Ray Maynard is the Chief Executive Officer of Skydive Long Island and, upon information and belief, its sole shareholder. Upon information and belief he is a citizen of New York.

5. Plaintiff is an experienced Tandem and Freefall (i.e., Skydive) instructor, who was an employee at Skydive Long Island for various summers in the last decade until his termination in July 2010.

JURISDICTION AND VENUE

6. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States, among them Title VII of the Civil Rights Act of 1964 as amended and the Fair Labor Standards Act. Jurisdiction is also independently predicated on diversity of citizenship.

7. Venue is properly placed in this district pursuant to 28 U.S.C. § 1391(c) in that Defendants Skydive Long Island is deemed to reside in this judicial district.

FACTUAL ALLEGATIONS UNDERLYING PLAINTIFF'S CLAIMS

8. Plaintiff repeats and realleges the allegations set forth in all previous paragraphs as if fully set forth herein.

9. Plaintiff was employed at Altitude Express, Inc., dba Skydive Long Island (hereinafter "Skydive Long Island") as a Tandem & Accelerated Freefall Instructor in the summers of 2001, 2009 and 2010. Altitude Express has approximately 20-30 employees.

10. Plaintiff is has been a licensed instructor in this field since 1995. He has participated in 3500 jumps over the course of his distinguished career.

11. He worked for the defendants in the summers of 2001, 2009 and 2010. Skydiving is a seasonal sport and defendants operate mostly in the warmer weather, although not exclusively so.

12. While employed by Skydive Long Island, plaintiff was expected to be at work, seven days a week, until released.

13. The hours of operation were either 7:30 AM to sunset or 9:30 AM to sunset.

14. Plaintiff was expected not to leave the premises in case a potential customer came, unless it was raining.

15. Although expected to be on the premises approximately twelve (or more) hours per day, plaintiff was only paid per jump.

16. Some days went by when he would be there all day and not make a dime, not even minimum wage for the hours he spent at work at his employer's insistence.

17. A skydive is a forcibly intimate experience, for the safety of the passenger. Novices who yearn for the thrill of a skydive cannot do so on their own, and thus the instructor must strap himself hip-to-hip and shoulder-to-shoulder with the client.

18. Because of this, before they dive, students at Skydive Long Island must sign a release that contains the following language:

> If I am making a student jump, I understand that I will be wearing a harness which will need to be adjusted by the jumpmaster. If my jump is a tandem jump, I understand that the tandem master will attach my harness to his and that this will put my body in close proximity to that of the tandem master. I specifically agree to this physical contact between the tandem master and myself.

19. Before the client and the instructor jump out of the plane, the client is typically sitting on the instructor's lap. The experience is typically tense for a novice, who is about to jump out of the plane with a stranger strapped to him or her.

20. Notwithstanding the waiver, in order to break the ice and make the client more comfortable, instructors often make light of the intimate situation by making a joke about it.

21. For example, when a man is strapped to another man, plaintiff witnessed instructors saying something like, "I bet you didn't know you were going to be strapped so close to a man." Plaintiff also heard instructors state, in reference to a budge protruding from the equipment, "That's the straps you're feeling.".

22. On more than one occasion, plaintiff heard straight instructors say, jokingly, when strapped to male clients, "Don't worry, I'm a lesbian." Or, when a straight man was strapped to a straight man (especially when his girlfriend was present), the instructor might say, "Does you're girlfriend know that you're gay?"

23. This was an openly tolerated form of banter. Plaintiff, as an openly gay man was often the butt of jokes about his sexual orientation. He had mixed feelings about that, but was not troubled when sexual banter was a way of breaking the ice in a tense situation. On occasion, over the years, when he was tightly strapped to a woman he might say something like, "You don't have to worry about us being so close because I'm gay."

24. This was never a problem until one homophobic customer complained about it. On June 18, 2010, plaintiff was suspended for

making this remark to a woman whose name, upon information and belief, is Rosanna.

25. It was known at work that plaintiff is gay and he was open about it. Notwithstanding this, however, the terms and conditions of employment were not the same as compared between plaintiff and other similarly situated employees.

26. Ray Maynard was hostile to any expression of sexual orientation that did not conform to sex stereotypes. Plaintiff has a typically masculine demeanor, but as one example, he criticized plaintiff's wearing of the color pink at work. Women at the workplace were allowed to wear pink, and did without criticism.

27. On one occasion, for example, plaintiff broke his ankle and had to wear a cast. It so happened that the color of the cast plaintiff chose was pink. When Ray saw the pink cast for the first time he scoffed at it and said, "That looks gay!" Later, at a staff meeting he said, "If you're going to remain here for the day, you're going to have to paint that black," pointing to plaintiff's cast. It was not a joke.

28. Plaintiff's toenails were also painted pink, which at the time was plaintiff's preference. Women often wore open-toed sandals to work, as well as pink toenail polish.

29. Additionally, many other instructors were barefoot at the drop zone. When Ray saw plaintiff's pink toenail polish, however, he insisted that plaintiff wear a sock and cover up his foot.

30. Plaintiff would have begrudgingly tolerated these backwards attitudes towards men and their use of certain colors, had plaintiff not been fired for expressing to a customer that he was gay.

31. Ray openly tolerated men discussing women and their physical attributes. Specifically, Ray and the men at the office would ogle at women's breasts, including on videos that the company had procured for passengers who had hired the company for a joy ride skydive with an accompanying video.[1] Men often talked of their sexual exploits, and Ray openly discussed his problematic marriage.

32. Plaintiff mentioning the fact that he is gay to a passenger, however, got him fired.

33. In his termination interview, Ray said that plaintiff was being fired because plaintiff had discussed his "personal escapades" outside of the office with a passenger (Rosanna).

34. This was completely untrue plaintiff merely stated he was gay.

35. Being gay is not an escapade; it is an immutable condition.

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[1] Customers who hired Altitude were referred to as "passengers."

36. All of the men at Altitude made light of the intimate nature of being strapped to a member of the opposite sex. Plaintiff was fired, however, because the levity he used honestly referred to his sexual orientation and did not conform to the straight male macho stereotype.

37. Mentioning one's sexual orientation is as much a protected activity as mentioning to someone that one is Catholic, Scottish, or Hispanic.

38. Ray made another statement in defense of his termination of plaintiff, including that plaintiff had allegedly touched Rosanna inappropriately, but he knew this to be a lie, as plaintiff is gay and Rosanna would have to be touched in order to protect her life.

39. Later, although he could have used the "touching" as a basis to get plaintiff's unemployment benefits denied, he did not and merely alleged that plaintiff should not get unemployment because he provided information of a "personal nature," or words to that effect, to Rosanna.

40. The "personal information" revealed was that plaintiff is gay; Maynard argued to the Unemployment Division that this was "misconduct" that should disqualify plaintiff from benefits.

41. Unemployment disagreed and plaintiff was awarded benefits. Neither Maynard nor Unemployment mentioned anything in connection

with the alleged touching, either because it did not happen or, in the alternative, even Maynard did not believe it.

42. It is unknown to plaintiff what Rosanna said before this complaint arose, but she did not complain to Maynard, merely said something to her boyfriend, who relayed it to Maynard, who immediately suspended plaintiff and docked his pay because he refunded the boyfriend's money.

43. The fact that Rosanna would simultaneously complain that plaintiff was gay *and* that he touched her inappropriately underscores the facially pretextual manner of this allegation, especially in light of the release that all passengers must sign, acknowledging that they will be in close bodily contact with instructors, and especially since plaintiff was regarded as an excellent skydive instructor, even by Maynard.

44. Maynard, however, did not even investigate Rosanna's allegations by inquiring of plaintiff's side of the story. He did not question plaintiff about the allegations – again, assuming she made them – but decided to accept them as true because, after all, she was a woman, and therefore would give Maynard cover for firing plaintiff since a woman, in general, would be more likely to be believed in the context of a complaint about inappropriate touching by a man.

45. Even though there was a videotape of the jump that showed no inappropriate touching, Maynard dismissed said evidence and purposely lost custody of the tape so that plaintiff could not use it in his defense.

46. In all, the allegation of touching, if it were even made by Rosanna, was a false pretext for plaintiff's termination, which happened because of one homophobic customer's complaint about being near a gay person and of because of plaintiff's failure to conform to stereotypical gender roles for men.

47. Maynard knew that plaintiff is a homosexual and would have no motive to touch a female passenger in any manner other than to protect her safety in accordance with proper procedures.

48. Maynard knew that Rosanna had signed a release wherein she knew she would in close bodily contact with an instructor.

49. Maynard's reaction to Rosanna's alleged complaint – without even as much as asking for plaintiff's side of the story -- is an instance of sex stereotyping, insofar as it validates a woman's complaint against a man whereas a man's complaint against a woman – gay or straight – would never have been accorded any credence in similar circumstances. Ray knew this, yet he was more than happy to use what he knew to be a

patently false touching complaint against a man as a pretext for firing for being – and saying – that plaintiff is gay.

50. In the alternative, if Maynard made up the allegation of touching, it was meant to bolster his justification for terminating plaintiff for stating he is gay. Maynard's invoking a sex stereotype – i.e., that a woman who complains of being touched by a man must be believed without investigation – in order to justify an unlawful termination is just as bad as if the sex stereotype originated in Rosanna's mind in order to give credence to her frivolous complaint about being told that someone is gay. Plaintiff now sues for relief.

FIRST CAUSE OF ACTION
DISCRIMINATION UNDER TITLE VII

51. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

52. Plaintiff was fired because his behavior did not conform to sex stereotypes and such actions were in violation of Title VII.

53. By virtue of the foregoing, Plaintiff has been damaged.

SECOND CAUSE OF ACTION
SEXUAL ORIENTATION DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

54. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

55. Plaintiff was fired because of his sexual orientation.

56. Such actions were in violation of the Executive Law of the State of New York.

57. By virtue of the foregoing, Plaintiff has been damaged.

THIRD CAUSE OF ACTION
GENDER DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

58. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

59. Plaintiff was fired because his behavior did not conform to sex stereotypes.

60. Such actions were in violation of the New York State Human Rights Law.

61. By virtue of the foregoing, Plaintiff has been damaged.

FOURTH CAUSE OF ACTION
VIOLATION OF THE NEW YORK MINIMUM WAGE LAW

62. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

63. At all material times herein Defendants failed to comply with, *inter alia*, NYLL § 663(1) and 12 NYCRR § 142-2.1 in that Plaintiff consistently worked for Defendants without being paid even a minimum wage for hours in which there were no paying customers.

64. Upon information and belief, Defendants were at all material times herein aware that minimum wage is mandatory.

65. Upon information and belief, Defendants' non-payment of minimum wages to Plaintiff was willful.

66. Based upon the foregoing, Defendants, for consistently violating New York's Labor Law and its implementing regulations are liable on Plaintiff's second cause of action in an amount to be determined at trial, plus a 100% statutory penalty and/or liquidated damages, attorney's fees and costs.

WHEREFORE, Plaintiff demands as follows:

A. Compensatory damages in excess of the jurisdictional amount required of this court;

B. Punitive damages;

C. Cost of suit and attorneys fees;

D. Liquidated damages;

E. Such other relief as the Court may deem just and proper.

Dated: New York, New York
March 28, 2014

/s/
GREGORY ANTOLLINO GA 5950
Attorney for Plaintiff
275 Seventh Avenue Suite 705
New York, NY 10001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA, Plaintiff vs. ALTITUDE EXPRESS, et ano., Defendants	)	Civil Action No. 10 CV 4334 (JFB)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR RECONSIDERATION OF THE DISMISSAL OF THE TITLE VII CLAIM

GREGORY ANTOLLINO, ES
Attorney for Plaintiff
275 Seventh Avenue
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New York, NY 10001
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August 7, 2015

PRELIMINARY STATEMENT

Congratulations - or condolences, as the case might be; I know you are a cautious judge, and this might be an uncomfortable position to be in, but You can be the first judge to hold that Title VII protects sexual orientation discrimination. You not only have that power, ab initio, as any court, rogue or otherwise, has power; but, for the reasons that follow, you *should* be the first judge to to hold that Title VII protects sexual orientation. The law, if you follow it closely, has opened up ever so slightly to allow this. The weight of authority at this time in history demonstrates that, while this admittedly is a close question, the deference you owe the EEOC under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) would not only allows, but essentially requires you to defer to agency interpretation in the absence of evidence of Congressional intent. You are in a position to ignore the mandate of Chevron, or apply the wooden, dated rule of Simonton v. Runyon, 232 F.3d 33 (2d Cir.2000) beyond that which the panel recognized its holding. Simonton was a close case written in precatory language; it was even amended to **remove** the following headnote (originally 7):

> Because the term "sex" in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C.S. § 2000e et seq ., refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation.

Compare id. with its prior incarnation, reported at 225 F.3d 122 (2d Cir. 2000). The Second Circuit allowed the *result* to stand in the amended opinion, but forsaw that the statement set forth in that headnote should not enter the federal reporter. Headnotes don't count for holdings: We're taught that in the first week of law school, but the removal of this headnote is significant because it speaks to the Circuit's intent in affirming the dismissal of a sexual-orientation discrimination claim on the narrow grounds of the grant of a 12(b)(6) motion, recognizing that the law would

likely develop in such a way as to make such a blanket statement imprudent. Further, Simonton *did not analyze the legislative history of Title VII*, but merely *subsequent* Congressional attempts to make it Title VII more clear. 232 F.3d at 35. But at the time there was no agency interpretation and that's not the way a court applies Chevron; the question is simply whether the agency's interpretation is reasonable, and whether Congressional intent in adopting the particular statute in question said anything *different* about how the agency interpreted the statute. Simonton not only did not analyze agency interpretation, but it not analyze the original congressional intent, which it admitted was vague. Id. at 35, citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986).[1]

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[1] Imagine a member of Congress introducing a bill protecting from discrimination Muslim worshippers who follow Sharia law. Such a bill would get nowhere in this political climate, notwithstanding that Title VII protects religious worship of any kind. If, hypothetically, that were to happen and a person thereafter were to bring suit alleging discrimination on the grounds of membership in the sect of Muslim faith that follows Sharia law, *the responsibility of the Court would be to protect the minority based on the plain language of the statute*, not interpolate Congressional intent from the 1960's based on a more current wave of discrimination. See, e.g., Awad v. Ziriax, 754 F. Supp. 2d 1298 (W.D. Okla. 2010), aff'd 670 F.3d 1111 (10th Cir. 2012) (granting injunction on legislative effort to outlaw Sharia Law on multiple grounds.). The polity did not speak of Sharia Law when the Civil Rights Act was passed, and no one knows why Title VII was adopted with sex as a protected class. The fact is that sex was thrown into the Act by an amendment to derail the bill, by an avowed racist, one "Mr. Smith" from Virginia, who absurdly noted: "The census of 1960 shows that we had [an imbalance] in this country . . . of 2,661,000 females. Just why the Creator would set up such an imbalance of spinsters, shutting off the 'right' of every female to have a husband of her own, is, of course, known only to nature. But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct, especially in this election year. Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their 'right' to a nice husband and family?" 110 Cong. Rec. 2577 (1964) (quoted in Francis J. Vaas, Title VII: Legislative History, 7 B.C.L. Rev. 431, 441-42 (1966)).

The question for this Court is not only whether Chevron deference trumps appellate precedent. The question is more nuanced to these facts: First, would the rules of Chevron apply without regard to appellate authority; (2) whether there is any bright line rule forbidding a district court from applying Chevron given newly adopted agency decisionmaking; and (3) whether these nuanced circumstances including (1) an almost complete absence of legislative history; (2) a clear statement of interpretation by the agency; (c) a very carefully worded decision in Runyon that was subsequently amended; and, most significantly (d) subsequent Second Circuit authority that has given deference to the EEOC's interpretation of the application of Title VII to sexual minorities. Finally, I'll throw in the judical economy argument. This is clearly a close call, but if you follow Chevron and you look to the clear development of Title VII in favor of the protection of sexual minorities like Donald Zarda, you would be courageous, but well suited to grant this motion.

PROCEDURAL SUMMARY

The procedural events leading to this motion are, synoptically, as follows: Plaintiff filed his complaint in 2010 alleging sexual orientation discrimination under state law and discrimination under Title VII alleging sex stereotypes under the nuanced rules afforded by the Second Circuit. See, e.g., Sassaman v. Gamache, 566 F.3d 307 (2d Cir. 2009). At the time of summary judgment, the Second Circuit had promulgated a case-by-case approach in which to a litigant could allege sexual sex stereotypes as a subset under Title VII, but shyed away from blatant sex stereotype claims based on the stereotype that men associate sexually with other men. The reasoning, as stated in Simonton, was that Congress had not adopted a sexual orientation discrimination cause of action, ipso facto, it must not have interpreted Title VII to have been

inclusive of sexual orientation discrimination. Though I would have preferred otherwise, this Court did not, on summary judgment, believe that there were sufficient facts to make it to the jury under Title VII, but allowed the sexual orientation claim to go trial given diversity. Sadly, the plaintiff died young, but there was sufficient evidence to allow his estate to substitute for the plaintiff and the case is scheduled for trial on October 13.

ARGUMENT

I. CHANGES IN THE INTERPRETATION OF TITLE VII

The EEOC, starting in 2011, began to take a more expansive view of Title VII as it related to sexual minorities. First, in Macy v. Holder, EEOC Appeal No. 0120120821, the Commission found that a transgender woman was discriminated against on the basis of Title VII, despite *additional* federal protections for gay and lesbian and transgender employees. The Commission held:

> While Complainant could have chosen to avail herself of the Agency's administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through [the Title VII]. Each of the formulations of Complainant's claims are simply different ways of stating the same claim of discrimination "based on . . . sex," a claim cognizable under Title VII.

Id. at p.6. After Macy came down, no less than the Second Circuit applied it in reversing Judge Kaplan[2] on an equitable-tolling issue. Fowlkes v. Ironworkers Local 40, 2015 U.S. App. LEXIS 10339 (2d Cir. N.Y. June 19, 2015):

> It was not until Macy v. Holder, (E.E.O.C. Apr. 20, 2012), published after Fowlkes filed his 2011 complaint, that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute

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[2] The decision said it was both Judge Preska and Kaplan; PACER confirms it was actually Judge Kaplan who sat in the district court.

> sex-based discrimination in violation of Title VII. Thus, Fowlkes's failure to exhaust could potentially be excused on the grounds that, in 2011, the EEOC had "taken a firm stand" against recognizing his Title VII discrimination claims.

Id. at *18. I think your answer is right there. The Second Circuit recognized Macy as explaining Title VII, notwithsanding no previous caselaw supporting the argument, and, indeed, some caselaw that seemed to contradict it. Now we have Complainant v. Foxx, Appeal No. 0120133080, which I have provided the court and holds straight away that sexual orientation discrimination is sex discrimination both because of sex steretypes and for associational discrimination. It chided the analysis that other courts have reached in rejecting the claims of sexual minorities' use of Title VII by holding that associational discrimination has long been recognized as a cognizable claim under Title VII, despite that said statute does not carve out a niche for blacks who date whites. The same is true as to sex stereotypes; there is no statutory language that creates a cause of action for "masculine women," nor, for that matter, sexual harassment - something that wasn't recognized until the 1970's, Meritor, nor same-sex sexual harassment, which wasn't recognized until the 1990's. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79, 78-80 (1998) ("statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). Lower courts and litigants cannot veritably wait until the Supreme Court rules on every single controversy. District Courts have to take a stand on issues that are foreseeably in the offing. Judge Weinstein recently held Foxx to be a landmark decision Roberts v. UPS, Inc., 2015 U.S. Dist. LEXIS 97989, *40 (E.D.N.Y. July 27, 2015) and described how the arc of history over the last few decades - and, indeed, since the filing of this case - has changed markedly towards

gays and lesbians. Id. at 39-42. He noted that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citations omitted)). It so happened that Roberts case was a diversity matter filed by the plaintiff in federal court, that pled no cause of action under Title VII, merely five claims under the City Administrative Code. (I checked PACER as to this, and Judge Weinstein's analysis doesn't mention Title VII as a basis for plaintiff's claims.) His analysis as to Title VII is therefore dicta, but one of the most highly respected and smartest judges in the country cannot be ignored.

II. FOXX ALONE WOULD REQUIRE CHEVRON DEFERENCE

The question presented to the Court is whether, in the midst of circuit caselaw that goes in one direction, what should the court do when the agency that interprets the law in question comes out with a holding seemingly, but not entirely, contrary to the Circuit authority. First, the question would be whether Foxx would require Chevron deference in the first instance. Chevron requires a two-part test:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, *the question for the court is whether the agency's answer is based on a permissible construction of the statute*.

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984).

A. Foxx Satisfies Chevron Step One: Statutory Ambiguity

Chevron deference is afforded to the adjudicatory function of the EEOC. See United States. v. Mead Corp., 533 U.S. 218, 226–27 (2001). See also Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325, 1335–36 (2011) citing Mead, 522 U.S. at 229, 234–35; City of Arlington, Tex. v. FCC, 133 S.Ct. 1863, 1874–75 (2013). Thus, the EEOC's commission decision in Foxx should be afforded deference insofar as its opinion resolves "ambiguities in statutes within [the] agency's jurisdiction to administer . . . [and] the agency [filled] the statutory gap in a reasonable fashion." Nat'l Cable & Tele. Comms. Assn. v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

Furthermore, as noted above in lengthy footnote 1, as well as Meritor, Title VII's legislative history does not address the meaning of the term "sex." Statutory terms are deemed "ambiguous" for Chevron purposes where no clear meaning can be divined after subjecting the text to traditional tools of statutory interpretation, including looking at the structure of the statute, drawing inferences of intent from statements of statutory goals, applying myriad canons of interpretation, and assessing statements from legislative history. K Mart Corp v. Cartier, Inc., 486 U.S. 281, 300 (1988). Where traditional tools of interpretation fail to divine definitive meaning, "ambiguity" is established. As such, the Supreme Court has repeatedly upheld that agency's interpretations pertaining to sex. See, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 679–83 (1983) (interpreting sex to include discrimination against men and to reach inequitable employer provided health benefits); Meritor, 477 U.S. at 65 (interpreting sex to include sexual harassment); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (interpreting sex to include gender and sex stereotyping); Oncale v. Sundowner Offshore

Servs., 523 U.S. 75, 78–79 (1998) (interpreting sex to include same-sex sexual harassment). Because the meaning of "sex" is ambiguous, Foxx satisfies the first step of Chevron.

B. Foxx Satisfies Chevron Step Two: Permissible Interpretation

Chevron step two is satisfied where the agency's interpretation is deemed to "reasonably effectuate Congress's intent for" the underlying statute and presents a tenable policy decision in light of statutory goals." Texas v. United States, 497 F.3d 491, 506 (5th Cir. 2007) citing Chevron, 467 U.S. at 845 ("If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," a court will not disturb that choice "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned."). See also Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (noting deference at step two is afforded where the agency is deemed to have made a "reasonable policy choice" and quoting Chevron, 467 U.S. at 845).

As the Supreme Court has recognized elsewhere, Title VII's proscription of discrimination "because of . . . sex" reaches "reasonably comparable evils" that are captured by the statutory text even where they lie outside Congress' "principal" target at enactment. Oncale, 523 U.S. at 79 (Scalia, J.). Thus, although Congress did not expressly state that Title VII would reach male-on-male sexual harassment, the broad statutory proscription of all "discrimination because of . . . sex" necessarily captures it. Id. ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); see also Newport News, 462 U.S. at 697–81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal

problem that Title VII's prohibition of sex discrimination was enacted to combat). Moreover, the EEOC's interpretation of Title VII need not be the "best one" in order for it to be "reasonable." E.E.O.C. v. Commercial Office Products Co., 486 U.S. 107, 115 (1988) (affording Chevron deference and noting "it is axiomatic that the EEOC's interpretation of Title VII . . . need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be *reasonable* to be entitled to deference.") (emphasis added).

The reasonability of the interpretation of sex is made plain by the end of the decision where the Commission states,

> Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. "Sexual orientation" as a concept cannot be defined or understood without reference to sex. A man is referred to as "gay" if he is physically and/or emotionally attracted to other men. A woman is referred to as "lesbian" if she is physically and/or emotionally attracted to other women. . . . Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.

Foxx at 6-7. There is nothing unreasonable about this interpretation and indeed it is self-evident. Furthermore, the Commission notes later in its decision that there is nothing in Title VII that protects "masculine women," "people in interracial relationships," women as "mothers," or non-religious people, but all of these categories are protected under Title VII. This analysis is unassailable, not just reasonable.

III. CHEVRON DEFERENCE SHOULD TRUMPS CIRCUIT AUTHORITY, AT LEAST WHERE THE AUTHORITY DID NOT ENGAGE IN A CHEVRON ANALYSIS

I have found two cases that mention in passing, but that do not discuss, a court's obligations under Chevron versus contrary circuit authority. In Nazif v. Computer Scis. Corp., 2015 U.S. Dist. LEXIS 78673 (N.D.Calif.2015), the district court noted the lack of circuit authority on a point for which there was agency authority in a footnote, p*17, n.5. The same is

true in Austin v. Jostens, Inc., 2008 U.S. Dist. LEXIS 83412 p*33 (D.Kan.2008). Both of these courts merely noted that there were no conflicts between Circuit and agency authority and did not analyze how to grapple with such a conundrum were it to exist. There is one decision, however, wherein the Ninth Circuit held on its own accord that Chevron deference trumped another form of statutory construction adopted by the Supreme Court in interpreting statutes pertaining to Indian Tribes. Confederated Salish & Kootenai Tribes v. United States, 343 F.3d 1193, 1198 (9th Cir. 2003). This decision is instructive insofar as the Ninth Circuit, without guidance from the higher court, decided that Chevron deference would trump other binding authority from the Supreme Court. So too must this Court decide whether newly created Chevron deference should trump Circuit authority that is obviously evolving. Further, I contend that Fowlkes v. Ironworkers Local 40, gives you that permission. The Circuit appointed counsel to the plaintiff in Fowlkes, whose case was dismissed because it had not been filed within ninety days (plus time for mailing) of the issuance of the right to sue letter. It allowed a healthy period of equitable tolling, however, noting that

> Fowlkes may have a colorable argument that filing a charge alleging discrimination based on his transgender status would have been futile. When Fowlkes filed his 2011 complaint, the EEOC had developed a consistent body of decisions that did not recognize Title VII claims based on the complainant's transgender status. . . . It was not until Macy v. Holder, published after Fowlkes filed his 2011 complaint, that the EEOC altered its position and concluded that discrimination against transgender individuals based on their transgender status does constitute sex-based discrimination in violation of Title VII. . . . Thus, Fowlkes's failure to exhaust could potentially be excused on the grounds that, in 2011, the EEOC had "taken a firm stand" against recognizing his Title VII . . . claims.

Fowlkes v. Ironworkers Local 40, 2015 U.S. App. LEXIS 10339, *17-18 (2d Cir. N.Y. June 19, 2015). The Circuit authority, indeed, had for the most part followed the earlier line of EEOC interpretation. See, e.g., Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) and Morales

v. ATP Health & Beauty Care, Inc., 2008 U.S. Dist. LEXIS 63540, *23 (D. Conn. Aug. 18, 2008) (citing Dawson). Now, all of the sudden, because of a new agency interpretation, a plaintiff is given the rare gift of an equitable tolling. This says something. This says that the Circuit looks to E.E.O.C. guidance in interpreting Title VII claims, and that you would be well advised to as well. Is the Circuit going to reverse you because you applied Chevron deference when it, too, is applying Chevron deference in a changing environment for sexual minorities? I don't see how a higher Court can insist that you afford deference under Chevron, yet simultaneously disregard it because of dated authority that does not afford Chevron deference. The Circuit, if this case reaches it, too, will have to give Chevron deference. As one commentator noted:

> Thus, if the Court's prior decision speaks in clear and unambiguous terms to the precise issue at hand, the prior decision should be controlling. But if the Court has not confronted the precise issue or if its holding is ambiguous, then the Court should uphold the agency's reasonable interpretation of the Court's precedent. This approach reconciles the values of stability, predictability, and rule of law underlying stare decisis with the advantages of flexibility and political accountability underlying Chevron.

Rebecca White, "The Stare Decisis "Exception" to the Chevron Deference Rule," 44 Florida Law Review 727-28 (1992). Chevron "broke new ground by invoking democratic theory as a basis for its deferential approach to judicial review." Thomas W. Merrill, "Judicial Deference to Executive Precedent," 101 Yale L.J. 969, 972-75 (1992) (discussing varying pre-Chevron methods used by the Supreme Court in determining when to defer to agency interpretation of statutes). As the Supreme Court has stated, "Precedent is not 'sacrosanct'; given a strong enough justification for overruling its precedent, the Court will not hesitate to do so." Patterson v. McClean Credit Union, 491 U.S.164, 172 (1989). The Second Circuit binds you to Chevron deference, New York

v. FERC, 783 F.3d 946 (2d Cir. 2015), and it recognized in Fowlkes, while not mentioning Chevron, that the agency's position has changed. Simonton cannot withstand Foxx, so you should recognize the change that is occurring and reinstate the Title VII claim.

IV. JUDICIAL ECONOMY MITIGATES IN FAVOR OF REINSTATING TITLE VII

During the conference, the Court noted that you would not prefer to allow the jury to deliberate on punitive damages, available under Title VII but not the New York Law, simply on the grounds of judicial economy. Nevertheless, I mention it again because with this new authority, it is almost certain that courts will adopt Foxx. It would be burdensome to everyone to retry a case on the grounds of punitive damages when, in the contingency that I am wrong - and I will not seek to execute a punitive damages judgment pending appeal, nor need we litigate attorneys' fees until a mandate issues - that we have to come back and do this all over again after five years of litigation and the death of the plaintiff. See, e.g., In Re: Nexium (Esomeprazole), slip op. (D.Mass July 30, 2015) (in discussing a trial, an experienced judge notes, "Like many judges, I reasoned that, since we were but a day away from submitting the case to the jury, the better part of valor lay in going to verdict and then unwinding it should I become convinced that the Defendants were entitled to judgment as matter of law."

CONCLUSION

Plaintiff asks that the Court reconsider the earlier order and reinstate the Title VII claim.

Dated: New York, New York
7 August 2015

/s/
Gregory Antollino, Esq.

15-3775

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Melissa Zarda, co-independent executors of the estate of Donald Zarda, William Allen Moore,Jr, co-independent executor of the estate of Donald Zarda,

Plaintiffs - Appellants,

v.

Altitude Express,Inc, doing business as Skydive Long Island, Ray Maynard,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

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June 15, 2016

RULE 26.1 STATEMENT

Pursuant Rule 26.1 of the Federal Rules of Appellate Procedure and to enable Judges of this Court to evaluate possible disqualification or recusal, the undersigned counsel for Defendants states as follows:

Defendant Altitude Express, Inc., d/b/a Skydive Long Island, is a domestic business corporation organized and existing under the laws of the State of New York.

Defendant Altitude Express, Inc., d/b/a Skydive Long Island is not a governmental entity, there are no parent corporations, nor does any publicly held corporation hold 10% of its stock.

By: _____

Zabell & Associates, P.C.
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Digitally signed by Saul D. Zabell
Date: 2016.06.28 12:29:11 -04'00'

Saul D. Zabell (SZ 2738)

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I. JURISDICTIONAL STATEMENT

Appellants, Melissa Zarda and William Allen Moore, Jr. as Co-Independent Executors of the Estate of Donald Zarda, ("Appellants") appeal from the United States District Court for the Eastern District of New York on behalf of Donald Zarda, who is deceased ("Zarda", or "Appellant"). Altitude Express d/b/a Skydive Long Island and Raymond Maynard ("Appellees", "SDLI" or "Maynard") do not contest or otherwise dispute the basis for the District Court's jurisdiction or that of the Court of Appeals.

II. STATEMENT OF ISSUES

Appellants' argue this Court should:

1. Vacate lower court's decision granting Summary Judgement on Zarda's claim for sexual orientation discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. ("Title VII") and the District Court's subsequent denial of Zarda's motion to for reconsideration where no such claim exists under federal law.

2. Determine that the District Court's decision to permit the filing of a June 20, 2014 Pre-trial Order, approximately sixteen (16) months before trial, constituted reversible error based upon the inclusion of fifty-seven (57) co-workers. Although, only three (3) were called as witnesses, each individual as well as the scope of their knowledge was disclosed during discovery and discussed by Donald Zarda himself.
3. Determine that the District Court's decision:
    a. Allowing evidence of Zarda's first of three separate terms of employment and termination therefrom constitutes reversible error;
    b. Allowing evidence of Zarda's belief that his Workers' Compensation claim was a possible basis for his termination was reversible error;
    c. Precluding Melissa Zarda and William Moore from testifying that Zarda went on a gay cruise because he lived in an airport shack, and that he touched his teeth was reversible error;

d. Allowing of any evidence critical of Zarda's workplace behavior was reversible error even though it formed the basis of his termination for legitimate business reasons; and

e. Allowing the term "odd" to be used to characterize the relationship between Zarda and his expert witness, whom he met, for the first time, as a patient in an emergency room.

III. STATEMENT OF THE CASE

Appellants' arguments aside, this is a straightforward dispute based on discrimination claims arising in the workplace. The central issues at hand are whether the Appellant, Donald Zarda, was in fact subject to impermissible discrimination and whether the basis for the alleged discrimination is protected under Title VII of the Civil Rights Act. The issue of sexual orientation discrimination falling outside the scope of Title VII has previously been addressed by Congress and subsequently interpreted by this Circuit. All facts forming the basis of Zarda's putative sexual orientation claim arising under Title VII have already been tried before a Jury of his peers within the context of the New York State Human Rights Law, NY EXEC. LAW §296, et seq. ("NYSHRL"). Upon the completion of a fair and proper trial, Zarda's

claims were ultimately determined to be unfounded. Here, should this Court determine that existing precedent has outlived both the logic and reason from which it was derived, Appellants' arguments must still be rejected by the Court because Zarda had an opportunity to present his allegations of discrimination to a jury of his peers under the corresponding state statute. This Court has consistently applied the same legal standard to claims arising under the NYSHRL as it does to claims arising under Title VII. In light of this construct and Zarda's inability to identify direct or circumstantial evidence supporting his position, his claims fail as a matter of law.

IV. STATEMENT OF FACTS RELEVANT TO THE APPEAL

Zarda began this litigation by alleging in his Amended Complaint, violations of New York State Human Rights Law, Title VII and New York State Labor Law. (JA0025-JA0040) Among those causes of action, Zarda claimed he was discharged because of a homophobic customer. (JA0025) Specifically, Zarda claimed that he had said to a customer that "You don't have to worry about us being so close because I'm gay." (JA0029) Zarda alleged that he was terminated for "mentioning the fact that he was gay to a passenger" and that he had touched a passenger

inappropriately. (JA0031-JA0032) At the time the Amended Complaint was filed, Zarda was unaware of the existence of a customer complaint. (JA0033) Zarda alleged in his Amended Complaint that he was fired from his position because his "behavior did not conform to sex stereotypes." (JA0035)

Summary Judgment

At summary judgment, Zarda's "gender stereotype discrimination, hostile work environment, and overtime claims" were each dismissed. Zarda's "sexual orientation discrimination claim" based upon his termination under New York State law, and minimum wage claim under New York State law were permitted. (JA0672) Zarda then moved for reconsideration of the dismissal of his gender stereotype discrimination and hostile work environment claims. (JA0021) By decision dated October 28, 2015, the District Court terminated Zarda's application for reconsideration of the Summary Judgment Decision. (SA024)[1]

[1] In addition to the Joint Appendix and Appellants' "Special Appendix", Appellees provide supplemental documentary evidence in their "Supplemental Appendix", references to which are (SA____).

Joint Pre-Trial Order

Zarda raises issues regarding the disclosure of fifty-seven (57) names contained within Appellees' witness list disclosed prior to the filing of the Pre-Trial Order. Zarda's June 5, 2014, letter motion first raised the issue of his not being aware of the names contained within Appellees' witness list and portion of the parties' Joint Pre-Trial Order. (JA0016, JA00682, JA00683) Zarda's June 5, 2014 letter motion was terminated on June 10, 2014 and Appellees were directed to include "information about the proposed defense witnesses" and that "plaintiff submit a letter to the Court by August 5, 2014, detailing any disputed objections to the designations." (*See* June 10, 2014 Order) (JA0017) On June 20, 2014, the parties submitted a Joint Pre-trial Order (see docket number 169 on (JA0017, JA0690-JA0704) which included the following language regarding the witnesses identified:

> **Defendants anticipate that the following witnesses will testify in person (witnesses 1-6 were deposition witnesses; witness 7 is a member of Rainbow Skydivers identified in Defendants' Rule 26 Disclosure Statement; witnesses 8-17 and 20-57 were employees from 2009-2010; and witnesses 18-19 were employees in 2001).** (JA0693)

Importantly, Zarda failed to file "a letter to the Court by August 5, 2014, detailing any disputed objections to the designations". Only after

the October 14, 2015 opening of trial, more than 14 months after being directed to do so, on October 16, 2015, Zarda filed a "Motion for Sanctions in precluding three or at least one for failure to adequately identify witnesses before trial." (JA0022, JA0731-JA0740) Although within his application, Zarda acknowledged being provided with the addresses for Shaw and Burrell during discovery, opposing counsel claimed to "have no idea who Kellinger is". This occurred despite Kellinger being identified in Zarda's document production, written Responses to Defendants' First Set of Interrogatories, the deposition of Winstock five (5) times (JA0395, JA0406, JA0417, JA0418) (SA008) and Zarda's own deposition nine (9) separate times. (JA0108, JA0110, JA0111, JA0113, JA0159, JA0162)

Trial

At trial, Appellants called Ira Helfand to testify as a fact witness. (JA0940) Mr. Helfand testified that he met Zarda in an emergency room in 1998 or 1999 as his treating physician and that they stayed in touch by phone for a few months. (JA0941) He further testified that despite an interruption in their conversations that lasted for several years, he

visited Zarda in 2007 or 2008 for dinner and "started being in touch again by telephone and talked from time to time." (JA0942)

Appellants then called Lauren Callanan (JA0963) who testified that she worked at Skydive Long Island from 2005 through 2011 (JA0964). In response to questions from Appellants' counsel, the following exchange occurred:

Q. When you go up in the sky in the plane, how would you describe the atmosphere before you are about to jump with the parachute?
A. Every single jump is different, so every experience is different.
Q. Would you characterize some as goofy?
A. At times.
Q. Would you characterize some as childlike?
A. Sometimes.
Q. Would you characterize some as boring?
A. Sure
Q. Would you characterize some as loose sexually?
A. Not necessarily, but I think to an extreme maybe. (JA0968)

Ms. Callanan, on direct examination from Appellants' counsel indicated she received a complaint about Zarda. Specifically, "that the customers were very unhappy with the service and felt that the instructor made inappropriate comments." (JA0976, JA0977) She further testified that the complainant relayed that the "skydive was

ruined and her first experience was not what she wished it would have been because of her instructor." (JA0978)

Appellants also called Mr. Winstock and on direct examination, he testified that he had learned that a customer had made a complaint about Zarda. (JA1071, JA1074) He further testified that he had advised tandem jump passengers that he was married and had children. (JA1075) This was done for purposes calming them down and "giving them a little bit of security knowing you have a reason to make this work." (JA1076) On cross examination, Winstock testified that Zarda was introduced to him as "Gay Don" prior to his employment with Appellees (JA1081 and JA1082) and that he introduced himself as "Gay Don". (JA1082) Winstock also testified that there is no reason for an extended touching of a tandem student's hips. (JA1082 & 1083) Winstock testified that the complaint against Zarda came from a husband "and it had to do with an inappropriate touching of the passenger and possible comments." (JA1084) He further testified that Zarda explained to him that he "preferred to actually take male passengers as opposed to female passengers." (JA1087) Winstock

testified that he was Zarda's supervisor and that Zarda never made any complaints to him about the workplace. (JA1088)

Zarda testified through his deposition testimony which was read into the evidence. Zarda filed an EEOC charge indicating that "I'm not making this charge based on my sexual orientation." (SA002-SA003) Zarda testified that Winstock was his Supervisor and that he felt he could bring any of his problems to Winstock's attention. (JA1163, JA1273, JA1274) With regard to his suspension and ultimate termination, Zarda testified that he was asked "a lot of questions" about the tandem "jump with Miss Rosanna" and that he did not remember a specific jump at that time to which he was referring. (JA1164-1165, JA1330, JA1331) Zarda acknowledged that Maynard, the owner of Skydive Long Island, was "investigating what I knew about" the complaint. (JA1166) Zarda acknowledged that his colleagues referred to him as "Gay Don" and that he "wasn't offended by that." And that he was treated "like anybody else." (JA1167)

Further, Zarda testified that his outward appearance lead people to believe that he was heterosexual and that he frequently was

mistaken for being straight and that such a mistake did not offend him. (JA1276-JA1277)

Relevant Workplace History

Zarda opined about his 2001 termination from SkyDive Long Island, "From the best I can recall, because Ray didn't discuss it with me, it had something to do with a customer being unhappy about not being able to do flips out of the airplane, or something that they wanted me to do out of the aircraft." (JA1169, JA1310, JA1325) Zarda testified that he was rehired in 2009, and that Appellees rehired him with full knowledge of his sexuality and that he had a positive working relationship with his colleagues. (JA1177) Zarda conceded he got along well with all of his colleagues in 2009. (JA1174) Zarda enjoyed working at Skydive Long Island until he broke his ankle in 2009, at which point, he stopped working on July 2, 2009. (JA1175)

In 2010, Zarda confirmed he did not have any negative interactions with any of his coworkers (JA1178) and none of his co-workers brought up his sexuality with the intent to hurt his feelings, or to be malicious. (JA1315) Zarda testified that Ray Maynard was taking things out on him because his Workers' Compensation insurance went

up drastically as a result of his claim for injury (JA1312) and that being upset about the Workers' Compensation premium increasing and the complaints about were a possible basis for his termination. (JA1313, JA1314, JA1316, JA1325)

2010 Customer Complaint

Tellingly, Zarda acknowledged that Mr. Kengle had lodged a complaint against him because "He said I was getting familiar with his girlfriend" (JA1285, JA1293, JA1294, JA1329) and that he conveyed that complaint to Ray Maynard. (JA1286) Zarda admitted disclosing his sexual orientation to Orellana because he sensed his actions made her feel uncomfortable. (JA1287) Zarda conceded he did not know what Maynard's motivation was for terminating him in 2010. (JA1299)

Rosanna Orellana, the female tandem jump student who complained about Zarda's behavior, was called by Appellants to testify. She testified on direct examination that Zarda made a joke about her being strapped to another guy. "He made the joke. He said to my boyfriend, how do you feel that I'm strapped to your girlfriend or something along lines. (JA1222) Ms. Orellana testified that Zarda whispered in her ear in a sensual manner. (JA1232) On cross-

examination, Orellana testified that the video introduced did not capture the entirety of the jump experience. (JA1245) She testified that Zarda made her feel uncomfortable by, "whispering in my ear, so close in a sensual way. And after that he kept, you know putting his chin on my shoulder, which I found to be like, inappropriate." She compared what she experienced to what she observed of her boyfriend's jump and testified that it made her "feel uncomfortable." (JA1247) She also testified that Zarda put his hands on her legs and no other instructors behaved in such a manner. (JA1247-JA1248) Orellana testified that Zarda made her feel uncomfortable and that his behavior was inappropriate. (JA1249) Orellana testified that instead of discussing the geography of what they were hovering over under the parachute that Zarda "was talking about his personal life. I can't remember the whole conversation, but something about a break up with his, you know, significant other and how upset he was because they had broken up. That's - - that was the main conversation during that period of time. (JA1253) After the jump, Orellana discussed what transpired with her boyfriend who had also jumped and they compared their respective experiences. At which point, Orellana expressed disappointment in her

jump experience. (JA1255-JA1256) On re-direct, Orellana testified that she expected Zarda "to do his job and talk about what he is supposed to talk about, which is the surrounding area." I'm not really, you know, a therapist, so if he wanted to talk about his personal life and his personal problems in his life, he should find a more appropriate time to talk about it, not while we are free falling with my life in his hands." (JA1262-JA1263)

David Kengle testified on direct examination that he complained to Maynard about Zarda's behavior with his girlfriend Orellana. (JA1405-JA1406, JA1410) Kengle testified, "I don't remember exactly the conversation that we had. I made a complaint based on what I felt was inappropriate and the story that my girlfriend Rosanna gave me at the time. Exactly what I told him, I don't remember the details, but he did refer to his personal life, referenced his personal life in some capacity. I felt that added inappropriateness, and that was my complaint." (JA1407) Kengle went on to explain that he complained about Zarda acting inappropriately in that he was flirtatious with Orellana, kept his hands on her hips, or thigh area throughout the jump, and was gesturing to his mouth. (JA1410-JA1412)

On direct examination by Appellants' counsel, Maynard testified that Zarda made him aware of his sexual orientation at the time of his first hiring in 2001. (JA1466). Maynard testified that he received a complaint about Zarda from Kengle. (JA1476) and that complaint included touching that made her feel uncomfortable (JA1478) and discussions between Zarda and Orellana that occurred during the fall from the plane. (JA1482, JA1543) Maynard testified that after he received the complaint, he started his investigation. (JA1544) As part of his investigation, Maynard asked Zarda questions about the jump which, upon reflection, he did not remember. He also testified that Zarda had a history of customer complaints and was spoken to twice before about these issues. (JA1482) After Maynard viewed the videotape of the jump, its content corroborated Kengle's complaint. (JA1482, JA1545)

Wayne Burrell testified that he was employed at Skydive Long Island for twenty-four (24) years as an instructor, and that he had worked with Zarda. (JA1514) Burrell testified that he observed Zarda "being a little unprofessional, rude not talking to them, not being

friendly" with female jumpers (JA1515 & JA1516) and that he had mentioned his observations to Maynard. (JA1516)

Duncan Shaw testified that he worked at Skydive Long Island for fifteen (15) years (JA1575) and that he worked with Zarda. (JA1576) He testified that Zarda introduced himself to others as, "Gay Don" (JA1577, JA1586) and frequently discussed his sexual orientation in front of co-workers and at times, went into detail about his relationships. (JA1577, JA1578-JA1580)

Curt Kellinger testified that he had worked at Skydive Long Island since 1992, up until a couple of years before his 2015 testimony. (JA1626) Kellinger knew Zarda and was instrumental in his hire at Skydive. (JA1627-JA1628) Kellinger testified that Zarda disclosed his sexual orientation to him at their first meeting. (JA1628, JA1629)

V. SUMMARY OF ARGUMENT

A. Sexual Orientation Discrimination is not a Prohibited Basis for Actionable Discrimination under Title VII.

While we offer no commentary on whether justice, equity, or morality should dictate otherwise, binding Second Circuit precedent confirms the Trial Judge properly refused to credit, or acknowledge any cause of action for sexual orientation discrimination arising under Title

VII. Notwithstanding recent societal inertia and the resultant effect upon administrative agencies, at present, there exists no such relief under Title VII. Nothing contained within Appellants' brief, or for that matter, any of the corresponding *amicus* briefs is sufficient to effectuate such change.

B. Judicial Deference to Administrative Decisions is not Mandatory

Appellants, not surprisingly, place great weight upon what they believe to be this Court's obligation to defer to the decisions of administrative agencies. However, in actuality, counsel's reliance upon the two seminal Supreme Court cases governing this practice is misplaced when, like here, Congressional intent is clear and unambiguous. Neither the *Skidmore*, nor the *Chevron* decision permits this Court to find in the law, protection for sexual orientation discrimination at a federal level, when Congressional intent indicates otherwise.

1. *Skidmore* Deference

This was an FLSA case involving unpaid overtime compensation. The Supreme Court held that "the rulings, interpretations and opinions of the Administrator under this Act" are not controlling, but they

"constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Court will evaluate an agency's decision in a case based on:

1. the thoroughness evident in its consideration;
2. the validity of its reasoning;
3. its consistency with earlier and later pronouncements; and
4. all those factors which give it power to persuade, if lacking power to control. *Id.*

This is a less deferential standard compared to that found in *Chevron.*

2. ***Chevron* Deference**

This case involved the construction of the term "stationary source" in an EPA regulation. The Supreme Court articulated a two-step test stating: **"First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.** If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute ... Rather, if the statute is silent or

ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (emphasis added).

Therefore, if Congress has already made a determination on an issue, the Court will defer to the intent of Congress. However, in a situation where Congress has not spoken on an issue, the Court should not attempt to construe the statute. Instead the Court should defer to the agency interpretation because the individuals in the agency are experts in that subject area and have more experience.

Here, as set forth below, Congressional intent is clear and Appellants' reliance upon *Chevron* in practical effect, bolsters Appellees' position.

C. The Second Circuit Decision in *Simonton* Remains Undisturbed.

In *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), the Second Circuit unequivocally held that "Title VII does not proscribe discrimination because of sexual orientation." *Id.* at 36. In reaching this conclusion, it cited "Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their

sexual preferences." *Id.* at 35 (*citing*, *e.g.*, Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); and the Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)).

Based on the Second Circuit's interpretation of Title VII in *Simonton*, Judge Bianco properly held that Appellants could not bring a claim under Title VII for discrimination based on sexual orientation. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005) ("[T]o the extent that [the plaintiff] is alleging discrimination based upon her lesbianism, [the plaintiff] cannot satisfy the first element of a *prima facie* case under Title VII because the statute does not recognize homosexuals as a protected class.").

The *Simonton* Court additionally looked to the other protected classifications under Title VII, reasoning that when read alongside the categories of race, color, religion, or nationality, "sex" could logically only refer to a class "delineated by gender, rather than sexual activity regardless of gender." *Id.* (*quoting DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306–07 (2d Cir. 1986)).

D. **The EEOC has not Displaced *Simonton*.**

Appellants argue, in sum and substance, that, even if *Simonton* is settled law, the decision was displaced by a July, 2015 EEOC ruling that Title VII protects against discrimination based on sexual orientation. (*relying on Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *1 (July 16, 2015)).

Appellants' position is incorrect. Binding Second Circuit precedent does not support a wider expansion or interpretation of *Baldwin,* (a federal sector case); certainly not one which would move this Court away from the well-reasoned decision in *Simonton.*

EEOC interpretations of Title VII are entitled to *Skidmore* deference at most—that is, "deference to the extent [that they have] the power to persuade." *Vill. of Freeport v. Barrella*, 814 F.3d 594, 619 (2d Cir. 2016) (relying on *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 53 (2d Cir. 2012); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, —— U.S. ——, 133 S.Ct. 2517, 2533 (2013)); *Crump v. T Coombs & Associates, LLC*, 13-CV-707, 2015 WL 5601885, at *24 n. 12 (E.D.Va. Sept. 22, 2015) (EEOC guidance given deference only to the extent that it has power to persuade).

The district courts that have decided Title VII claims in the wake of *Foxx* have also given the EEOC's interpretation of Title VII deference to the extent that the EEOC's decision is persuasive. *E.g., Christiansen v. Omnicom Grp., Inc.*, No. 15 CIV. 3440 (KPF), —— F.Supp.3d ——, ——, 2016 WL 951581, at *15 (S.D.N.Y. Mar. 9, 2016); *Videckis v. Pepperdine Univ.*, No. CV-15-00298 (DDP) (JCX), —— F.Supp.3d ——, ——, 2015 WL 8916764, at *8 (C.D.Cal. Dec. 15, 2015); *Isaacs v. Felder Servs., LLC*, 13-CV-0693 (MHT), ——F.Supp.3d ——, —— – ——, 2015 WL 6560655, at *3–4 (M.D.Ala. Oct. 29, 2015); *Dew v. Edmunds*, No. 1:15–CV–00149 (CWD), 2015 WL 5886184, at *9 (D. Idaho Oct. 8, 2015); *Burrows v. Coll. of Cent. Florida*, 14–CV–197 (PRL), 2015 WL 5257135, at *2 (M.D.Fla. Sept. 9, 2015).

District courts have, however, split on whether to follow the EEOC or to follow the law of their regional circuits and their own districts. *Christiansen* and *Burrows* noted that the EEOC's decision was entitled to deference to the extent that it was persuasive, but found that the decision could not displace the explicit holdings of their regional circuit court (in the case of *Christiansen*) or of their own district (in the case of *Burrows*). *Christiansen*, —— F.Supp.3d at ——, 2016 WL

951581, at *15; *Burrows*, 2015 WL 5257135, at *2. As the *Christiansen* court noted: (1) the conduct before it was "reprehensible"; (2) "[t]he broader legal landscape has undergone significant changes" toward increased protection against sexual orientation discrimination in recent years; and (3) current rules recognizing Title VII discrimination claims based on sexual stereotyping but barring claims based on sexual orientation discrimination are incoherent. *Christiansen*, —— F.Supp.3d at ——— – ———, 2016 WL 951581, at *13–15. **However, that court still concluded that that, under binding Second Circuit precedent, it could not adopt the EEOC's position**.

By contrast, *Isaacs* and *Videckis* adopted the EEOC's position without addressing governing precedent from the regional circuit or their own district. *Isaacs*, —— F.Supp.3d at ——— – ———, 2015 WL 6560655, at *3–4; *Videckis*, —— F.Supp.3d at ———, 2015 WL 8916764, at *8.

Appellants latch onto the aforementioned decision in *Isaacs,* package it with the *Baldwin* holding, and present it to this Court as a cogent means by which to overturn *Simonton.* Logical syllogism aside, this strategy is patently ineffectual.

Appellants' counsel states that a court has already found *Baldwin* to be persuasive. (*See* Appellant's Brief, 39) "These cases pre-date *Baldwin* and now apply with greater force. The EEOC is entitled to deference under *Chevron*, as the agency charged with enforcing Title VII, or insofar as it is able to persuade. *Skidmore*, 323 U.S. 140 (1944). *Baldwin* is persuasive, and at least one court has already so found. *Isaacs v. Felder Servs., LLC*, 2015 U.S. Dist. Lexis 146663 at *8-9 (M.D. Ala. Oct 29, 2015)."

While the court in *Isaacs*, a case originating out of the Middle Distract of Alabama, discussed *Baldwin,* and in the course of doing so, stated it was "compelling", the court ultimately held that "this claim fails for the same reason Isaacs's other discrimination claims fail: He has offered no direct or circumstantial evidence to suggest that the decision of Felder Services to fire him was based on his sexual orientation." *Isaacs v. Felder Servs., LLC*, 2015 U.S. Dist. Lexis 146663 at *4 (M.D. Ala. Oct 29, 2015). As set forth in the proceeding section of this brief, Appellants' putative claim of sexual orientation discrimination arising under Title VII is also fatally flawed for the same

reasons. Plainly, the *Isaacs* decision does not alter the calculus of this dispute.

Although curiously absent from Appellants' brief, we would be remiss not to point out that in one notable case, The Eastern District of New York adopted the EEOC's position, notwithstanding explicit Second Circuit law to the contrary. *See Roberts v. United Parcel Serv., Inc.*, 115 F.Supp.3d 344 (E.D.N.Y. 2015) (surveying the federal and local sea-change in attitudes towards sexual orientation discrimination). However, the logic in *Roberts* has been disputed because a district court simply cannot change the law of the regional circuit. *Hinton v. Virginia Union University*, 2016 WL 2621967 at *5, (E.D.Va. May 5, 2016). This decision weighs on the present dispute to the extent Appellant asks this Court to change the law of the Second Circuit despite the existence of black letter statutory language to the contrary.

Appellants advance, in support of their arguments, decisions where courts have adopted the EEOC's position. However, the scope and reach of Title VII properly lies within the exclusive purview of the Legislative branch. Since Congressional intent is clearly articulated, the two (2) step analysis in *Chevron* is not applicable and the sound

reasoning behind the *Simonton* decision remains the guiding principle by which this case is governed.

Absent amendment, Title VII, as written, does not encompass sexual orientation discrimination claims. The EEOC's *Baldwin* decision is at best, persuasive authority; its application is inherently limited. Appellants cannot state a claim for discrimination under Title VII and the Trial Judge did not commit reversible error by failing to allow such a claim to proceed.

E. Any Putative Claim for Sexual Orientation Discrimination Arising Under Title VII Fails as a Matter of Law

1. Disparate Treatment

While not presently actionable under Title VII, claims of sexual orientation discrimination are actionable under the New York State Human Rights Law. *Stephenson v. Hotel Employees & Rest. Employees Union Local 100 of the AFL-CIO*, 6 N.Y.3d 265, 271 (2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 224 (2d Cir. 2005).

Importantly, and for purposes of the pending appeal, courts analyze claims under the NYSHRL using the same standards that apply to federal civil rights statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. *See Weinstock v. Columbia*

Univ., 224 F.3d 33, 42 & n. 1 (2d Cir. 2000); *see also Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 n. 3,786 N.Y.S.2d 382, 819 N.E.2d 998 (2004).

The question of whether such claims are viable is determined by the familiar *McDonnell Douglas* burden shifting analysis used for Title VII claims. *Id.*; *Dawson v. Bumble & Bumble*, 398 F.3d 211, 224 (2d Cir. 2005); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To meet this burden, Plaintiff must demonstrate that "(1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class." *Id.* If the Plaintiff does so, "a presumption of discrimination arises and the burden shifts to the Defendant to proffer some legitimate, nondiscriminatory reason for the adverse decision or action." *Dawson v. Bumble & Bumble*, 398 F.3d 211, 216 (2d Cir. 2005). If the Defendant does so, "the presumption of discrimination created by the *prima facie* case drops out of the analysis, and the Defendant will be entitled to summary judgment unless the

Plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." *Id.* (internal quotations and citations omitted). In analyzing the Defendant's business decision, courts must refrain from second-guessing a business's decision making process. *Meiri v. Dacon*, 759 F.2d 989, 995 (2d Cir. 1985) *see, e.g., Sweeney v. Research Foundation of the State Univ. of N.Y.*, 711 F.2d 1179, 1187 n. 11 (2d Cir. 1983).

2. **There Exists No Inference of Impermissible Discrimination**

At trial, Appellants failed to meet their burden under the *McDonnell Douglas* analysis, because a jury of Zarda's peers determined that he failed to establish that he was terminated under circumstances which give rise to an inference of impermissible discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Certain factors "strongly suggest that invidious discrimination [is] unlikely. For example, where the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [that person] an invidious motivation that would be inconsistent with the decision to hire." *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir.1997); *Chin v. ABN-AMRO N. Am., Inc.*, 463

F. Supp. 2d 294, 304 (E.D.N.Y. 2006); *Zuffante v. Elderplan, Inc.*, 2004 WL 744858, at *6 (S.D.N.Y. Mar. 31, 2004). Invidious discrimination is especially unlikely when the termination "occurred a short time after the hiring." *Id.* at 560; *see Cooper v. Morgenthau*, 2001 WL 868003, at *6 (S.D.N.Y. July 31, 2001) ("The 'underlying rationale for the [same actor] inference is simple: it is suspect to claim that the same manager who hired a person in the protected class would suddenly develop an aversion to members of that class.'").

Here, Maynard hired Zarda on three (3) separate occasions: 2001, 2009 and 2010. (JA0107, JA0108, JA0112, JA0113, JA0339, JA0342). Each time Maynard invited Zarda to work at SDLI, Maynard had full knowledge of his sexual orientation because Zarda was openly gay. (JA0107, JA0109, JA0113, JA0334, JA0397, JA0418). Maynard was aware of Zarda's sexual orientation yet continued to bring him back to SDLI to work. Additionally, Maynard was the person who decided to fire Zarda. (JA0107, JA0108, JA0112, JA0113, JA0148, JA0339, JA0342, JA0371). Given that Maynard decided to hire Zarda, with full knowledge of his sexual orientation, and subsequently decided to fire him, there can be no inference of discrimination. *Grady*, 130 F.3d at

560. It is illogical to suggest, as Appellants now do, that Maynard would re-hire Zarda, knowing his sexual orientation, if he had any aversion to homosexuals. *See Cooper*, 2001 WL 868003, at *6. Additionally, Zarda was terminated within two (2) years of his hire date - he was hired late in 2008 and terminated in June 2010. (JA0108, JA0109, JA0148, JA0371, JA0337). The short period between his hire date and his termination creates a strong inference that Zarda was not subjected to invidious discrimination. *Grady*, 130 F.3d at 560; *see Cooper v. Morgenthau*, 2001 WL 868003, at *6 (S.D.N.Y. July 31, 2001) (holding the inference of no discriminatory animus due when plaintiff was hired and fired by the same person "should be accorded substantial weight where the time period between the hiring and firing is less than two years."). Moreover, Zarda was suspended and terminated in the immediate wake of a customer complaint. (JA0102, JA0103, JA0346). Again, the close proximity between the complaint about Zarda's conduct and his termination indicate that he was terminated based solely on his inability to satisfy a customer. The jury properly found that Zarda was not fired under circumstances giving rise to an inference of

impermissible discrimination. *Grady*, 130 F.3d at 560; *Cooper*, 2001 WL 868003, at *6.

3. **Appellees had a Legitimate, Non-Discriminatory Reason for Zarda's Discharge.**

Even if, assuming, *arguendo*, Zarda could somehow demonstrate that he was terminated under circumstances which give rise to an inference of discrimination, Appellees had a legitimate, non-discriminatory reason for the termination. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Zarda's termination was a result of a customer complaint regarding his behavior. (JA0152, JA0136, JA0154, JA0150, JA0164).

A customer complaint is a legitimate business reason for termination. *See Iverson v. Verizon Communications*, 2009 WL 3334796, at *5 (S.D.N.Y. Oct. 13, 2009) (holding plaintiff was terminated for legitimate business reasons because plaintiff had poor performance and received multiple customer complaints); *Hayes v. Cablevision Sys. New York City Corp.*, 2012 WL 1106850, at *15 (E.D.N.Y. Mar. 31, 2012) (holding customer complaints and written reprimands were sufficient to show a legitimate business reason for plaintiff's termination). SDLI is first and foremost a customer service

business, in which the highest priority is customer safety and the second is ensuring an enjoyable experience. (JA0128, JA0129, JA0323). On June 18, 2010, Zarda was unable to provide a customer with an enjoyable experience. (JA0144, JA0476, JA0489). Instead, Kengle and Orellana were placed in an uncomfortable position because Zarda put his hands on Orellana's hips, rested his chin on her shoulder, and in the course of doing so, disclosed intimate details of his personal life. (JA0476, JA0486, JA0489, JA0454, JA0464, JA0465). As a result, Orellana and Kengle had a dissatisfactory experience and called SDLI to lodge a complaint. (JA0345, JA0456, JA0457). This alone is the reason Zarda was terminated. (JA0103, JA0148, JA0152, JA0136, JA0154, JA0150, JA0164, JA0371). In terminating Zarda, Maynard made a business decision to eliminate an employee who failed to provide the customer with one of the core goals of skydiving – an enjoyable experience. This decision was based on SDLI's desire to please its customer base, not Zarda's sexual orientation. Zarda himself conceded that the customer complaint regarding his behavior was unrelated to his sexual orientation. (JA0183). Appellants cannot rebut this fact. In addition, Zarda was the only instructor Maynard had ever received

complaints about in his twenty (20) years at SDLI, Maynard properly responded to the complaint with immediate and unbiased corrective action. (JA0317, JA0318, JA0375). Parenthetically, this was not the first incidence in which a customer complained about Zarda during a jump; he received a prior customer complaint in 2001. (JA0108, JA0147, JA0148, JA0165). In terminating Zarda, Maynard simply eliminated an employee who, on at least two (2) separate occasions, failed to provide satisfactory customer service. Therefore, Zarda was terminated for a legitimate, non-discriminatory reason and the jury properly dismissed his claim for sexual orientation discrimination.

F. Appellees did not Engage in Trial by "Ambush".

To the extent Appellants suggest the inclusion of a certain number of witnesses in the parties' proposed Joint Pre-Trial Order, dated June 20, 2014, constitutes "trial by ambush," such a theory is nullified by the objective, factual record. Appellants claim Appellees' counsel was, for all intents and purposes, motivated by a nefarious agenda by including fifty-seven (57) potential witnesses in their portion of the proposed Joint Pre-Trial Order.

First and foremost, there exists no threshold number of witnesses, the inclusion of which would presumptively violate any local or federal rule. Appellees respectfully maintain that in a case such as the one at bar, its actions were, at all times, eminently reasonable. Appellees' proposed witnesses were each Zarda's former co-workers during his three (3) separate tenures at SDLI. Since skydiving is weather dependent, jumpers are migratory by nature. (JA0027, JA0049, JA0081, JA0165) As demonstrated during the pre-trial process, jumper availability was difficult to manage. This fact necessitated the inclusion of each of Zarda's former co-workers. (JA0682-JA0688)

Tellingly, while the Joint Pre-Trial Order was filed with the Court on June 20, 2014, and Jury Trial commenced on October 13, 2015, the names of the three (3) witnesses which form the basis of Appellees' position were disclosed several years earlier. (SA008, SA021, SA022, SA023)

Specifically, the names of the following witnesses appeared in documents exchanged by the parties at the corresponding dates below:

1. **Wayne Burrell:** Zarda served his response to Appellees' First Set of Interrogatories on April 7, 2011. Appellees' second interrogatory

required Zarda to identify "all individuals employed by Defendant who partook in purported banter or conversation with Defendant's customers and/or clients as described in ¶18 of Plaintiff's Complaint." To which, Zarda responded by providing an extensive list of names, including a "Wayne Burrell." Appellees' request did not inquire about Wayne Burrell specifically. His name did not appear in the interrogatory. Instead, Zarda first identified Mr. Burrell as possessing information related to this action by providing his name in direct response to a legitimate discovery demand. Again, this discovery response was served several years before the ultimate trial.

2. **Curt Kellinger**: Appellants similarly claim a lack of knowledge about Mr. Kellinger. However, Appellants' counsel produced a response to Appellees' First Request for the Production of Documents on February 1, 2011 which included, amongst other items, documents referencing Curt Kellinger. Specifically, Zarda produced an e-mail chain reflecting a conversation between he and Curt Kellinger *via* Facebook. (SA022, SA023) On April 7, 2011, Zarda produced a response to Appellees' First Set of

Interrogatories, in which Curt Kellinger was identified as possessing information relevant to this matter. Additionally, Curt Kellinger's name was referenced prominently during the depositions of Richard Winstock and Zarda. Specifically, Mr. Kellinger was referenced no fewer than five (5) separate times during Winstock's deposition and no fewer than nine (9) separate times during Zarda's deposition. (JA0395, JA0406, JA0417, JA0418, JA0108, JA0110, JA0111, JA0113, JA0159, JA0162) Tellingly, Richard Winstock was the first to introduce Curt Kellinger's name in his deposition testimony, rather than counsel for Appellees. (JA0395) Similarly, Zarda was the first to introduce Mr. Kellinger, or "Curt," in his own testimony without being prompted to do so by counsel. (JA0108)

3. **Duncan Shaw**: Appellants' allegations regarding Duncan Shaw are wholly inaccurate as Mr. Shaw was referenced more frequently than any of the three (3) witnesses upon which opposing counsel relies in support of his argument. Zarda first introduced Mr. Shaw's name in response to Appellees' First Request for the Production of Documents on February 1, 2011.

(SA021) Zarda, yet again, provided Duncan Shaw's name in response to Appellees' First Set of Interrogatories on April 7, 2011. In addition, Duncan Shaw was referenced in four (4) separate depositions. (JA0402, JA0320, JA0336, JA0348, JA0441) Tellingly, Zarda referenced Duncan Shaw during his deposition on no fewer than twenty (20) separate occasions. (JA0108, JA0110, JA0111, JA0161, JA0162, JA0166, JA0174, JA0175)

Despite the foregoing, Appellants insist they were somehow "ambushed at trial" by the inclusion of these witnesses and that such action constitutes reversible error. In support of his position, counsel relies upon the decisions in *US v. Charles Kelly and Raymond Imp*, 420 F.2d 26 (1969) and *US v. Richard Baum and Joseph Scapoli*, 482 F.2d 1325, 1331 (2nd Cir., 1973). However, the relatively aged and highly contextualized cases upon which Appellants rely are insufficient to support any finding that Appellees, in any manner, "ambushed" Appellants.

Specifically, *US v. Charles Kelly and Raymond Imp*, 420 F.2d 26 (2d Cir. 1969) is a criminal case involving two New York City detectives conspiring to traffic drugs. The trial took place in 1968 at which time

there was a new "neutron activation" technique to demonstrate that the drugs all came from the same batch. The Defendants objected to the neutron activation evidence as well as the government expert who discussed the technique in his testimony. A new trial is granted so the defense has the opportunity to attempt the technique. This is distinguishable because the new trial was connected to the scientific process in question and not the witness.

Further, *United States v. Richard Baum and Joseph Scapoli*, 482 F.2d 1325, 1331 (2nd Cir. 1973) is a criminal case involving criminal possession of radios. The Defendants/Appellants claimed prejudice based on the evidence provided by the government's final witness, Greenhalgh, to prove Baum's knowledge that the radios were stolen. The Court found "no reason for non-disclosure was advanced by the government. Greenhalgh's testimony was crucial to the prosecution; it was equally crucial to the defense. *Cf. Rovario v. United States*, 353 U.S. 53, 60 (1957); *United States ex rel. Wilkins*, 326 F.2d 135, 140 (2d Cir. 1964). The court held a new trial was required to afford Defendant Baum a fair opportunity to meet the critical and damaging proof of an offense not presented against him in the indictment. The government

failed to disclose the identity of the witness but did not justify a reason for non-disclosure. The case has no practical application to the present dispute.

Appellees respectfully submit more recent decisions which center upon a party's failure to disclose the identity of trial witnesses are far more relevant that those upon which Appellants rely.

For example, in *Lopez v. City of New York*, No. 11-CV-2607 (CBA) (RER), 2012 WL 2250713 (E.D.N.Y. June 15, 2012), Plaintiffs moved to preclude Defendants from offering at trial any witnesses not specifically disclosed to date. The Court granted the Order and the Defendants moved the Court to reconsider the motion. The Court stated, "[W]hat Rule 37 clearly prohibits, however, is for Defendants to knowingly fail to disclose percipient witnesses in violation of their obligations under Rule 26(a) and (e)(1), and then seek to have those witnesses testify at trial." The goal of the Rules is "to avoid surprise or trial by ambush." The Court also considers prejudice to Defendants. The Court held that there is no prejudice or harm to Defendants and upholding the previously granted Order. Here, as set forth above, Zarda himself either disclosed and/or testified as to the identity and relevance of each

trial witness in question. In light of such facts, there can be no "ambush".

Further, in *LaVigna v. State Farm Mut. Auto. Ins. Co.*, 736 F. Supp. 2d 504, 511 (N.D.N.Y. 2010), Plaintiff sued her former employer after termination. The employee argued Defendant should be precluded from relying on her supervisor's affidavit because Defendant violated Rule 26 and initially failed to identify him "as an individual likely to have discoverable information." The Court pointed out that Plaintiff, in a situation like here, "had full awareness of [his] role and involvement in the events at issue here."

Plainly, the frequency with which Messrs. Shaw, Kellinger and Burrell appeared during the discovery period, particularly since Appellant himself disclosed their names and identified them as possessing relevant information, nullifies any claim that Appellees attempted to conduct a "trial by ambush." We respectfully submit this Court should disregard any argument to the contrary.

VII. CONCLUSION

For all the foregoing reasons, Appellees respectfully request this Court deny Appellants' appeal in its entirety because 1) there does not exist a cognizable claim for sexual orientation discrimination under Title VII and 2) because there was no reversible error at trial.

Dated: Bohemia, New York
June 15, 2016

ZABELL & ASSOCIATES, P.C.
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